No. 84-495

In The
Supreme Court of the United States
October Term, 1984

RICHARD THORNBURGH, H. ARNOLD MULLER, HELEN B. O'BANNON, MICHAEL J. BROWNE, WILLIAM R. DAVIS, LEROY S. ZIMMERMAN, personally and in their official capacities, and JOSEPH A. SMYTH, JR., personally and in his official capacity, together with all others similarly situated,

Appellants,

v.

AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, PENNSYLVANIA SECTION; HENRY H. FETTERMAN, M.D., THOMAS ALLEN, M.D., and FRANCIS L. HUTCHINS, JR., M.D. on behalf of themselves and all others similarly situated; ALLEN J. KLINE, D.O., on behalf of himself and all others similarly situated; BROOKS R. SUSMAN; PAUL WASHINGTON; MORGAN P. PLANT, on behalf of herself and all others similarly situated; ELIZABETH BLACKWELL HEALTH CENTER FOR WOMEN; PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA; REPRODUCTIVE HEALTH AND COUNSELING CENTER; and WOMEN'S HEALTH SERVICES, INC.,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

TABLE OF CITATIONS—Continued

TABLE OF CITATIONS—Continued

STATUTES

COURT RULES

OTHER AUTHORITIES

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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether the appeal in this matter should be dismissed, and the papers treated as a petition for writ of certiorari, because the appeal is taken from an interlocutory order of the court of appeals reversing in part the district court's ruling on a request for preliminary injunction.

2. Considering the appeal papers as a petition for writ of certiorari, whether that petition should be denied because there are no special or important reasons which warrant the granting of that petition.

3. If this Court does not dismiss the appeal, whether the decision of the court of appeals should be summarily affirmed because it correctly applies prior decisions of this Court which establish the standards for determining the constitutionality of state statutes regulating abortions.

COUNTERSTATEMENT OF THE CASE

Appellants, officials of the Commonwealth of Pennsylvania who were defendants before the district court ("Commonwealth appellants"), seek to invoke this Court's jurisdiction by way of appeal to review portions of a decision entered on May 31, 1984 by the United States Court of Appeals for the Third Circuit.

Appellees, plaintiffs below ("appellees"), after filing their complaint, moved for a preliminary injunction against enforcement of the Pennsylvania Abortion Control Act of 1982, 18 Pa. Cons. Stat. Ann. §§3201-3220 (Purdon 1983) (the "Act"), because the Act, if enforced, would violate the constitutional rights of women seeking abortions in Pennsylvania. The district court, in its opinion issued prior to this Court's decisions in *Akron, Ashcroft* and *Simopoulos*,[1] concluded that appellees were likely to succeed solely with respect to their challenge to the 24-hour waiting period in Section 3205 of the Act. Accordingly, the

1. *City of Akron v. Akron Center for Reproductive Health, Inc.*, Nos. 81-746 and 81-1172, 103 S.Ct. 2481 (1983) *("Akron"); Planned Parenthood Association of Kansas City v. Ashcroft*, Nos. 81-1255 and 81-1623, 103 S.Ct. 2517 (1983); *("Ashcroft"); Simopoulos v. Virginia*, No. 81-185, 103 S.Ct. 2532 (1983) *("Simopoulos")*.

district court preliminarily enjoined only this section. (App. 270a-272a).

This decision was appealed to the Court of Appeals for the Third Circuit, which granted an injunction against enforcement of the entire Act pending review and deferred its final ruling on the appeal until this Court rendered its decisions in *Akron, Ashcroft* and *Simopoulos*. As a result, the court of appeals was able to apply this Court's most recent and most comprehensive explication of the constitutional standards which must be met by legislation regulating abortion. Indeed, the Act contains sections similar to many of the legislative provisions considered by the Court in those recent cases, so that the court of appeals was afforded explicit guidance in determining the constitutionality of numerous provisions of the Act.

In light of this Court's decisions, it was apparent that the district court had applied the wrong standard when it concluded that appellees were not likely to succeed on many of their constitutional challenges. Indeed, the Commonwealth appellants were forced to concede before the court of appeals that three sections of the Act were plainly unconstitutional under *Akron*, namely, the 24-hour waiting period and the physician-only counseling provisions of Section 3205 and the requirement of Section 3209 that all post-first trimester abortions be performed in a hospital. (App. 33a-36a).

With respect to other provisions that the Commonwealth appellants did not concede to be unconstitutional, the court of appeals determined the constitutionality of each challenged section on the basis of this Court's prior decisions, a careful analysis of the statutory language and

the record before it. The court of appeals did not reach out to find the entire Act unconstitutional, nor did it uncritically accept the Commonwealth appellants' position that only those sections conceded to be unconstitutional should be enjoined.

The court of appeals rejected the due process and equal protection challenges to the Act as a whole by construing the definitions of "abortion" and "physician" in Section 3203 so as to eliminate any constitutional infirmities. (App. 36a-43a). Similarly, in considering challenges to specific provisions of the Act, the court, where possible, avoided constitutional problems by construction. For example, the court of appeals concluded that Section 3210(a), imposing criminal penalties on physicians who perform abortions after the fetus becomes viable, would be facially constitutional if the Commonwealth had the burden to prove that the abortion was necessary to preserve the life or health of the pregnant woman or that the physician believed in good faith that the fetus was not viable. (App. 59a-68a). The court of appeals also held that Section 3206 of the Act, requiring that a minor obtain parental consent for an abortion or seek an order from the court permitting the abortion, was facially constitutional under *Ashcroft*, despite the variety of constitutional challenges to that provision asserted by appellees.[2] (App. 50a-56a).

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2. Contrary to the suggestion at the opening of the Commonwealth appellants' jurisdictional statement, the court of appeals did not find the parental/judicial consent provisions of § 3206 to be facially unconstitutional. It did, however, temporarily enjoin enforcement of § 3206 until the Pennsylvania Supreme Court acts, pursuant to the mandate of § 3206(h), to promulgate rules necessary to insure that judicial proceedings occur expeditiously and confidentially.

In other instances, the court of appeals refused to enjoin preliminarily sections of the Act because the record before the district court and the court of appeals was insufficient to establish that the provisions would interfere with the exercise of constitutionally protected rights. Thus, the court of appeals sustained the district court's refusal to enjoin enforcement of Sections 3207(b) and 3214(f), which require abortion facilities to file reports with the Commonwealth to be made available for public inspection and copying, despite appellees' contention that these sections will subject physicians, staff members, and women who seek medical services from those facilities to acts of violence, threats or harassment from forces opposed to abortion. (App. 57a-58a).

On the other side of the ledger, the court of appeals concluded that appellees had met their burden with respect to several specific challenges to the Act. Thus, the court enjoined enforcement of Section 3205 because, in addition to imposing a 24-hour waiting period and physician-only counseling, this section required the physician to recite a litany of specific pieces of information in all cases in order to secure "informed consent," thereby unconstitutionally prohibiting the physician from tailoring the information to the needs of each woman. (App. 43a-50a). The court of appeals also enjoined enforcement of Section 3210(b) because that section, on its face, would require a physician to elevate the life and health of the fetus over the life and health of the pregnant woman when performing a post-viability abortion. (App. 68a-71a). Similarly, the court of appeals enjoined the requirement in Section 3210(c) that a second physician be present during a post-viability abortion because that section does no

contain an exception for medical emergencies. (App. 71a-75a). The court also enjoined the reporting requirements of Section 3214(a), (b), (c) and (h), concluding that the Commonwealth appellants had failed to justify the detailed and burdensome reports mandated for each individual procedure. (App. 77a-82a). Finally, the court of appeals enjoined enforcement of Section 3215(e), which imposes certain limitations on health insurers in Pennsylvania that provide coverage for abortion procedures, because the Commonwealth appellants had afforded no justification sufficient to sustain this regulation.[3] (App. 83a-86a).

In light of this Court's decisions in *Akron* and *Ashcroft* and earlier cases, the court of appeals recognized that the determination of the unconstitutionality of several sections was a matter of statutory construction that did not require consideration of a factual record. The legal arguments necessary to the court's determination in these instances were fully presented by the parties in briefs and oral argument both before and after the decisions in *Akron*, *Ashcroft* and *Simopoulos*. Thus, while the matter came before the Third Circuit on appeal from a ruling on a motion for preliminary relief, these issues were ripe for a decision on the merits. In the interest of judicial economy and to provide guidance to the district court upon remand, the court of appeals held these sections unconstitutional as a matter of law. However, recognizing that there were still issues to be resolved by the district court after final hear-

3. For unexplained reasons, the Commonwealth appellants are not appealing the court of appeals' determination with respect to the constitutionality of the insurance provisions of § 3215(e) "at this time." (Jurisdictional Statement at 4 n.3).

ing, the court of appeals simply vacated the district court's erroneous ruling on the preliminary injunction request and remanded the matter for further consideration in light of its opinion. (App. 154a).

ARGUMENT

I. Because The Commonwealth Appellants Seek Review Of Only A Portion Of An Interlocutory Order Of The Court Of Appeals, This Court Should Dismiss The Appeal And Treat The Papers As A Petition For Writ Of Certiorari.

The Commonwealth appellants bring this matter as an appeal, invoking this Court's jurisdiction under 28 U.S.C. § 1254(2).[4] Given the procedural posture of this matter, however, the decision of the court of appeals lacks the degree of finality necessary to an assertion of this Court's jurisdiction by way of appeal.

This matter came before the court of appeals on appeal from an interlocutory order, entered on a stipulated record, largely denying a request for a preliminary injunction. Because of the manifest error in the district court's

4. This provision, which requires that the decision from which the appeal is taken hold invalid a state statute "as repugnant to the Constitution, treaties or laws of the United States," does not confer jurisdiction by way of appeal to review the decision of the court of appeals as to the parental/judicial consent provisions of § 3206 of the Act. Indeed, the court of appeals expressly concluded that "we cannot hold that the provision [§ 3206] is facially unconstitutional." (App. 54a-55a). The court's holding that implementation of this section must await the Pennsylvania Supreme Court's promulgation of rules consistent with the express mandate of § 3206(h) is subject to this Court's review only by writ of certiorari.

ruling, particularly considering this Court's subsequent decisions in *Akron, Ashcroft* and *Simopoulos,* the court of appeals vacated that interlocutory order and remanded the matter for further proceedings consistent with its opinion.

While the court of appeals was able to conclude that certain provisions of the Act do not, on their face, pass constitutional muster, much remains to be done by the district court on remand before a final decree determining all constitutional challenges can be entered. Particularly with respect to those issues which the court of appeals was unable to resolve because of an incomplete record, the parties must offer additional evidence at a final hearing on the merits. Indeed, the Commonwealth appellants do not consider the court of appeals' disposition final, even with respect to those provisions conceded to be unconstitutional before that court:

> The 24-hour requirement [of § 3205(a)(2)] is not pressed here by appellants in light of the Court's ruling in *Akron.* Nevertheless, as with all challenged provisions of the Act, appellants wish to preserve their right to offer evidence in support of the 24-hour requirement at trial. (Jurisdictional Statement at 22, n.13).

Given the strong resistence offered by the Commonwealth appellants to date, it appears inevitable that any final determination by the district court that provisions of the Act are unconstitutional will be appealed to the Third Circuit and, ultimately, to this Court. The Commonwealth appellants indicate as much in their Jurisdictional Statement when they note that they are not appealing the adverse ruling on the constitutionality of the insurance provision in Section 3215(e) "at this time." (Jurisdictional Statement at 4, n.3).

By its terms, 28 U.S.C. § 1254(2) does not limit the Supreme Court's jurisdiction by way of appeal to final orders of the various courts of appeals. However, the Court has construed Section 1254(2) and its predecessor provision as importing a finality requirement and dismissed appeals where that requirement was not met. *South Carolina Electric & Gas Co. v. Flemming,* 351 U.S. 901 (1956) *(per curiam); Slaker v. O'Connor,* 278 U.S. 188 (1929).

In 1962, Congress expanded the scope of 28 U.S.C. § 2103, which provides that an appeal improvidently taken to this Court be treated as a petition for writ of certiorari, to apply to appeals from the courts of appeals. In subsequent cases where an appeal was taken from an order of a court of appeals that was not final, this Court has dismissed the appeal and treated the papers as a petition for writ of certiorari, in accordance with Section 2103. *Doran v. Salem Inn, Inc.,* 422 U.S. 922 (1975) (dismissing appeal from interlocutory order by court of appeals affirming district court's entry of preliminary injunction against enforcement of local ordinance); *City of El Paso v. Simmons,* 379 U.S. 497 (1965).

As in *Doran* and *City of El Paso,* the decision of the court of appeals is not final. The court of appeals did not direct the entry of final judgment in any respect; rather, it vacated the district court's order and remanded the matter for further proceedings. In the course of that remand, the Commonwealth appellants have expressed their intention to build a record which they contend will result in a finding that all sections of the Act are constitutional, in-

cluding those that they have previously conceded to be unconstitutional. Thus, there are substantial federal constitutional issues yet to be resolved by the district court. Accordingly, an exercise of this Court's appellate jurisdiction over those portions of the Third Circuit's decision that the Commonwealth appellants have elected to appeal at this time would likely result in piecemeal appeals which the requirement of finality is, in part, intended to prevent. *See Abney v. United States,* 431 U.S. 651, 656-57 (1977); *City of New Orleans v. Dukes,* 427 U.S. 297, 301-02 (1976); *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949) ("The purpose [of the finality requirement in 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.").

Under these circumstances, this Court should dismiss the appeal, as it did in *City of El Paso* and *Doran,* and treat the papers filed by the Commonwealth appellants as a petition for writ of certiorari.[5]

II. Treating The Papers Filed By The Commonwealth Appellants As A Petition For Writ Of Certiorari, That Petition Should Be Denied.

As Supreme Court Rule 17 provides: "A review on writ of certiorari is not a matter of right, but of sound

5. A dismissal of the appeal at this interlocutory stage of the case will in no way preclude this Court from considering the merits of any issues that the Commonwealth appellants raise in an appeal or petition for writ of certiorari filed after final judgment. *See Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363, 365 n.1 (1973); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.,* 392 U.S. 481, 488 n.6 (1968); *Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964).

judicial discretion, and will be granted only when there are special and important reasons therefor." Applying the considerations which normally govern this Court's exercise of that discretion to hear cases from courts of appeals, a writ of certiorari should not issue here.

The Commonwealth appellants do not suggest that the court of appeals' determination of the issues raised in this Court conflicts with any decision of another court of appeals or a state court of last resort, and appellants are not aware of any conflicting decisions.[6] As discussed in section III below, all of the constitutional questions resolved by the court of appeals have been recently considered by this Court. The court's resolution of these questions in the context of the Pennsylvania Act fully comports with this Court's prior decisions.

Another consideration governing review by certiorari from a court of appeals decision is whether the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1(a). The Commonwealth appellants portray the Third Circuit panel as having departed from the accepted and usual course of judicial proceedings by going out of its way to resolve on the merits all of the issues raised in the appeal from the district court's ruling. A full reading of the court of appeals' opinion, however, establishes that

6. In the only reported state or federal appellate decision involving a statute regulating abortion since *Akron, Ashcroft* and *Simopoulos,* the court enjoined as unconstitutional the parental notification section of an Indiana statute. *Indiana Planned Parenthood Affiliates Ass'n v. Pearson,* 716 F.2d 1127 (7th Cir. 1983).

the court made careful and reasoned determinations on each issue raised by the parties. In several instances, the court of appeals was able to conclude that sections of the Act, on their face, were plainly unconstitutional under this Court's rulings in *Akron*, *Ashcroft* and *Simopoulos*, which were not available to the district court or the parties at the time of the initial ruling, and that no factual record that might be developed on remand could alter this result. In the interest of judicial economy, the court of appeals took the logical step of applying those dispositive decisions to declare these sections unconstitutional as a matter of law, even though the case initially came to that court on appeal from a ruling on a preliminary injunction.

The Third Circuit's action falls well within the bounds of accepted and usual appellate procedure. As a general matter, the standard of appellate review from a ruling on a preliminary injunction is whether the district court abused its discretion. *E.g., Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975). It is incumbent upon a court of appeals to reverse the district court's ruling "if the district court has proceeded on the basis of an erroneous view of the applicable law." *Donovan v. Bierwirth*, 680 F.2d 263, 269 (2d Cir.) (Friendly, J.), *cert. denied*, 459 U.S. 1069 (1982). *Accord, Apple Computer Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1242 (3d Cir. 1983), *cert. dismissed*, 104 S.Ct. 690 (1984); *Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980); *see Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938).

The similarity between the statutory provisions held unconstitutional in *Akron*, *Ashcroft* or *Simopoulos* and those at issue in this case was so great in several instances that no question as to the constitutionality of these provi-

sions remained. Thus, by the time the Third Circuit rendered its decision, it was apparent that the district court's view of the applicable law was erroneous, and a decision on the merits with respect to these issues was fully warranted.

As Professors Wright and Miller state:

> Review [on an appeal from a decision on a preliminary injunction] quite properly extends to all matters inextricably bound up with the remedial decision. In addition, the scope of review may extend further to allow disposition of all matters appropriately raised by the record, including entry of final judgment. Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development. Any other rule frequently would require wasted litigation without any off-setting advantage in economy of appellate effort or uninterrupted trial court proceedings.

16 *C.A. Wright, A.R. Miller, E.H. Casper, Federal Practice and Procedure* § 3921 at p. 17 (1977). Recognizing this interest in judicial economy and the prompt dispensation of justice, courts of appeals have frequently reached the ultimate merits on appeal from an order granting or denying preliminary relief. *E.g., E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 204 (D.C. Cir. 1974); *Ballas v. Symm*, 494 F.2d 1167, 1170-71 (5th Cir. 1974); *Hedberg v. State Farm Mutual Automobile Insurance Co.*, 350 F.2d 924, 933 (8th Cir. 1965) (Blackman, J.). In those instances where the Third Circuit resolved appellees' constitutional challenges as a matter of law, it did so only where the result was compelled by this Court's decisions, in the interest of

judicial economy and to give the district court appropriate guidance in further proceedings.[7]

There is no special or important reason for this Court to exercise its certiorari jurisdiction in this matter. Accordingly, considering the papers filed by the Commonwealth appellants as a petition for writ of certiorari, that petition should be denied.

III. If The Appeal In This Matter Is Not Dismissed, Then This Court Should Summarily Affirm The Decision Of the Third Circuit Because No Further Argument Is Required.

In the event this Court does not dismiss the appeal, then it should summarily affirm the decision below. The court of appeals has applied the standards for determining the constitutionality of state statutes which regulate abortions announced by this Court in *Akron, Ashcroft* and *Simopoulos* and earlier decisions, and reached a result consistent with these standards. This appeal thus presents questions which are so insubstantial that further argument is not required.

(1) Section 3206 of the Act requires that, except in cases of medical emergency, an unemancipated minor woman seeking an abortion must either obtain the consent

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7. With respect to issues where the merits were not reached, the court of appeals offered an explanation for its decision, including, in some cases, the specific reasons why appellees failed to sustain their burden to establish a record sufficient to warrant the granting of preliminary relief. The Commonwealth appellants' characterization of this appropriate direction to the district court as "uncalled for hints" to appellees should be rejected out-of-hand. In any event, this certainly offers no basis for the granting of a writ of certiorari.

of her parent or guardian or petition the court for a determination that she is sufficiently mature to make her own decision or that an abortion is in her best interest. Following this Court's teaching in *Ashcroft,* in which the parental/judicial consent provision in a Missouri statute was held constitutional on its face, the court of appeals concluded that Section 3206 withstood a facial challenge to its constitutionality. (App. 50a-56a). The court recognized, however, that the provisions of Section 3206 are not nearly as explicit as those in the Missouri statute, particularly with respect to insuring that the courts consider petitions expeditiously and confidentially. Nevertheless, the court of appeals concluded that any resulting constitutional infirmities were cured by Section 3206(h), providing:

> The Supreme Court of Pennsylvania shall issue promptly such rules as may be necessary to assure that the process provided in this section is conducted in such a manner as will ensure confidentiality and sufficient precedence over other pending matters to ensure promptness of disposition.

Despite this express direction in the staute, the record before the court of appeals revealed that the Pennsylvania Supreme Court has not promulgated such rules.[8] The panel

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8. Nor had the Pennsylvania Supreme Court expressly determined that such rules were unnecessary. To the contrary, the record revealed that Pennsylvania's Chief Justice issued a letter stating that the Orphans Court Rules Committee of the Pennsylvania courts had been directed to review the matter to determine the extent to which general rules are necessary and to prepare and propose such rules. In the interim, the lower courts were directed to treat proceedings under the Act "in a manner appropriately analogous to the procedures for maintaining confidentiality at hearings and for impounding proceedings under the Adoption Act." The court of appeals held that this interim direction to employ rules speaking only to confidentiality did not satisfy the mandate of § 3206(h) or cure the constitutional infirmities which would otherwise result.

unanimously held that Section 3206 could not be enforced until rules were in place sufficient to insure the confidentiality and expedition needed to render a parental/judicial consent provision constitutional. *See Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (plurality opinion).[9]

Thus, the impediment to enforcement of Section 3206 is not the decision of the court of appeals, but the Pennsylvania Supreme Court's failure to promulgate rules as expressly directed by the statute. The court of appeals cannot be faulted for requiring that the Pennsylvania judiciary take those steps necessary to insure that Section 3206, as applied, comports fully with federal constitutional standards.[10]

(2) Section 3210(b) of the Act compels a physician performing an abortion after the fetus is determined to be viable to choose the medical procedure which would pro-

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9. In the jurisdictional statement, the Commonwealth appellants raise for the first time the existence of a rule of judicial administration effective April 1, 1983 (more than one year prior to the Third Circuit's decision) which they contend satisfies the mandate of § 3206(h). This rule does no more than the earlier letter to the judges of the lower courts, insofar as it directs courts to apply the confidentiality provisions of the rules relating to adoption procedures. In any event, any argument that this rule is sufficient to cure constitutional infirmities in § 3206 must be addressed in the first instance to the courts below.

10. The court's direction to enjoin enforcement of § 3206 until rules are promulgated does not run afoul of the principle that federal courts should assume state courts will adopt procedures necessary to render judicial consent statutes constitutional. *See, e.g., Ashcroft*, 103 S.Ct. at 2525 n.16. This ruling makes no presumption as to whether final rules promulgated by the Pennsylvania Supreme Court will satisfy constitutional standards; rather, it recognizes that the interim steps taken by the Pennsylvania courts are not sufficient in this respect.

vide the best opportunity for the fetus to be born alive unless that procedure would present a "significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique. . . ."[11] A physician who fails to comply with this requirement commits a felony of the third degree, which carries a maximum penalty of seven years imprisonment and a fine of $15,000. 18 Pa. Cons. Stat. Ann. §§ 1101(2), 1103(3) (Purdon 1983). In *Colautti v. Franklin*, 439 U.S. 379 (1979), this Court assessed the constitutionality of a provision in the earlier Pennsylvania Abortion Control Act of 1974, similar to the one at issue here, that controlled the physician's choice of technique in post-viability abortions. The constitutional standard against which such provisions are to be measured was set forth in *Colautti* as follows:

> The statute does not clearly specify, as appellants imply, that the woman's life and health must always prevail over the fetus' life and health when they conflict.
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> • • •
>
> Consequently, it is uncertain whether the statute permits the physician to consider his duty to the patient to be paramount to his duty to the fetus, or whether it requires the physician to make a "tradeoff" between the woman's health and additional percentage points of fetal survival. Serious ethical and constitutional difficulties, that we do not address, lurk behind this ambiguity. We hold only that where conflicting duties

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11. Section 3210(a) prohibits abortions after the fetus is viable unless necessary to preserve the life or health of the pregnant woman. Consequently, the proscription of § 3210(b) with respect to the choice of method or technique will come into play only in situations where the physician has already determined that his patient's life or health is threatened absent the abortion.

> of this magnitude are involved, the state, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions.

Id. at 400-01.

The Commonwealth appellants do not dispute that the court of appeals properly relied upon *Colautti* in considering the constitutionality of Section 3210(b). Nor could they seriously contend that the term "significantly greater," if given its usual and customary meaning, would permit the physician in all instances to choose that method of abortion which best serves the medical interest of the pregnant woman. Rather, the Commonwealth appellants contend that the court should have eliminated any ambiguity in Section 3210(b) by striking the word "significantly" from the section.

The court of appeals unanimously declined this invitation to rewrite the Act, as did this Court in Colautti. (App. 68a-71a). In contrast to those constitutional challenges which could be cured by a limiting construction, the court properly recognized that it could not rewrite the criminal provisions of Section 3210(b) in a manner that simply ignores the express formulation chosen by the Pennsylvania legislature. Because the constitutional challenge to this particular section presented a matter of pure statutory construction, there was no reason for the court of appeals to await further evidentiary proceedings in the district court before expressing its opinion that the section is unconstitutional as a matter of law.

(3) Section 3210(c) of the Act requires the attendance of a second physician for abortions performed after the fetus has become viable. In *Ashcroft,* six justices of this Court concluded that a similar second doctor requirement in the Missouri statute could not withstand constitutional scrutiny if the statute failed to provide an exception for medical emergencies in which securing the presence of a second physician may endanger the woman's health. 103 S. Ct. at 2522, n.8, 2530-31. Again, the Commonwealth appellants do not question the court of appeals' conclusion that, in light of *Ashcroft,* a medical emergency exception to Section 3210(c) is constitutionally mandated. Rather, they contend that the court erred when it failed to find such an exception in the language in Subsection 3210(a) which provides:

> It shall be a complete defense to any charge brought against a physician for violating the requirements of this section that he had concluded in good faith, in his best medical judgement, . . . that the abortion was necessary to preserve maternal life or health.

The court of appeals correctly concluded that this language only protects the physician against a charge that the post-viability abortion was unlawful in the first instance, and it does not provide a medical emergency exception to the second doctor requirement, found in a separate subsection. (App. 71a-75a).

More importantly, reading this language to provide a medical emergency exception cannot be squared with the remaining provisions of the Act. In Section 3203, the term "medical emergency" is defined as follows:

> That condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of same to avert the death of the mother or for which a 24-hour delay will create grave peril of immediate and irreversible loss of major bodily function.

In five sections of the Act, express exceptions for a medical emergency, as narrowly defined, are provided.[12] In sharp contrast, no express medical emergency exception is found in Section 3210(c). Obviously, the Pennsylvania General Assembly knew how to provide for a medical emergency exception when it intended to do so. Therefore, the court of appeals concluded that this section could not be found constitutional under *Ashcroft*. As with the "significantly greater" language in Section 3210(b), the question of the presence or absence of an exception for medical emergencies presented an issue of statutory construction which required no evidentiary record. Having found that the requisite exception was not present, the court of appeals properly held Section 3210(c) unconstitutional as a matter of law.

(4) In order for the consent of a woman seeking an abortion to be deemed "informed," Section 3205 of the Act mandates that certain pieces of information be provided to all women, irrespective of their individual circumstances, that some of this information be provided to the woman solely by a physician, and that the physician wait 24 hours between the time the woman receives the information and the time the abortion is performed. In light of this Court's clear holding in *Akron*, the Commonwealth appellants conceded before the court of appeals that the doctor-only counseling requirement and the 24-hour waiting period requirement are unconstitutional. The court also properly recognized that, under the reasoning of *Akron*, the specific informational requirements must fall. (App. 43a-50a).

12. The requirement of a private medical consultation prior to the abortion (§ 3204), the informed consent requirements (§ 3205), the parental/judicial consent requirements (§ 3206), the requirement that post-first trimester abortions be performed in a hospital (§ 3209) and the requirement that no public official issue any order requiring an abortion without the express voluntary consent of the woman (§ 3215(f)) all contain express exceptions for medical emergencies.

The Commonwealth appellants argue that the court of appeals should have considered each of the eight informational requirements independently and, applying the severability clause of the statute, declare only the objectionable requirements to be unconstitutional.[13] This argument, however, simply ignores one of this Court's bases for declaring the informational requirements in the *Akron* ordinance unconstitutional:

> An additional, and equally decisive, objection to Section 1870.06(B) is its intrusion upon the discretion of the pregnant woman's physician. This provision specifies a litany of information that the physician must recite to each woman regardless of whether in his judgment the information is relevant to her personal decision. . . . Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent. By insisting upon recitation of a lengthly and inflexible list of informatinon, Akron unreasonably

13. This argument is based upon a comment in *Akron* that some of the information requested by the Akron ordinance was "not objectionable, and probably is routinely made available to the patient." 103 S.Ct. at 2501, n.37. This Court expressly declined, however, to sever arguably unobjectionable information requirements because of the other unconstitutional components of the informed consent provision. Here, the court of appeals similarly declined to sever provisions of § 3205, given that that section also contained the patently unconstitutional 24-hour waiting period and doctor-only counseling requirements.

> has placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision." *Whalen v. Roe*, 429 U.S. 589, 604 n.33, 97 S.Ct. 869, 879 n.33, 51 L.Ed.2d 64 (1977).

103 S.Ct. at 2500-01. Like the Akron ordinance, Section 3205 of the Act specifies a litany of information that must be provided to all women in all cases, including information about the availability of public assistance benefits and financial support from the father of the child. Plainly, this information is not relevant to each woman's personal decision whether or not to have an abortion, and it is far removed from the physical and emotional implications of that decision. Measuring the detailed informed consent requirements of Section 3205 against this Court's holding in *Akron*, the court of appeals correctly concluded that these provisions could not constitutionally be enforced as a matter of law.

(5) Section 3214 of the Act imposes extraordinary reporting requirements for each abortion performed, whatever the stage of pregnancy. As accurately described by the court of appeals:

> The physician must sign a report to be filed the following month, which includes 14 categories of data, including but not limited to identification of the physician, facility, and referring physician, agency or service; the political subdivision and state in which the woman resides; her age, race and marital status; the number of her prior pregnancies; the date of her last menstrual period and probable gestational age of the unborn child; the type of procedure performed; complications; the "length and weight of the aborted unborn child when measurable"; the "[b]asis for any medical judgment that a medical emergency existed," the viability report referred to in Section 3211(a), and

> the method of payment for the abortion. Another detailed report must be filed by the physician as to each woman who has "complications" from an abortion or attempted abortion. (App. 77a-78a).

The constitutional limits which must be met by statutory provisions of this type was last considered by this Court in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). At issue in *Danforth* was a requirement of Missouri law that a physician maintain records of abortions performed and make those records available to public health officials. The Court concluded that, "Recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are permissible." *Id.* at 80. The Court also concluded that the relatively non-intrusive recordkeeping requirements in *Danforth* "approach[ed] impermissible limits," and the Court cautioned that such provisions must not be "utilized in such a way as to accomplish, through the sheer burden of recordkeeping detail, what we have held to be an otherwise unconstitutional restriction." *Id.* at 81.

Confronted here with a statute which required that highly detailed reports be filed with public officials, a record which established that the making of these reports would increase the cost of abortions and the failure of the Commonwealth to offer a compelling state interest to justify the reporting requirements, the court of appeals held that Section 3214(a), (b), (e) and (h) crossed the threshold of unconstitutionality described in *Danforth*. (App. 77a-82a). Thus, the court of appeals necessarily reversed the district court's refusal to enter a preliminary injunction as to these provisions.

A preliminary injunction against the enforcement of the reporting requirements is plainly warranted on the record before the Third Circuit. If enforcement of these provisions is permanently enjoined at the conclusion of the proceedings before the district court, the merits of that decision can be considered on the basis of a complete record by the appellate courts, including this Court, should the matter return to it. Therefore, if the merits of the appeal are considered at this time, the interlocutory decision of the court of appeals should be affirmed.

CONCLUSION

For all of the foregoing reasons, this Court should dismiss the appeal for want of finality, consider the appeal papers as a petition for writ of certiorari and deny that petition. Alternatively, if the Court does not dismiss the appeal, then the decision of the United States Court of Appeals for the Third Circuit from which the appeal is taken should be summarily affirmed.

Respectfully submitted,

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